No. 2690

United States

Circuit Court of Appeals

For the Ninth Circuit.

R. WOODLAND GATES,
Appellant,

vs.

COLUMBIA - KNICKERBOCKER TRUST COMPANY, a corporation, Trustee,
Appellee.

Appellee's Brief.

Upon Appeal from the United States District Court for the District of Nevada.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA.

By this appeal, the appellant, R. Woodland Gates, seeks to impress upon 480 acres of land situate in Nevada, alleged to be the property of the Pacific Reclamation Company, a lien to the amount of $25,000.00 for legal services alleged to have been performed by him for said company between July, 1911, and March, 1913, in the Land Department of the United States. The

legal services are alleged to consist of proceedings had before the General Land Office and the Secretary of the Interior, involving certain relinquishments, script locations and Carey Act reclamation matters involving said lands.

I.

THE APPELLANT IS NOT ENTITLED TO ANY LIEN UPON THE LAND.

There is no claim of any contract or agreement between client and attorney, either express or implied, by which appellant is entitled to a lien upon the land for his legal services.

Appellant seeks to predicate his claim to equitable interference to create a lien upon land in his favor solely upon some supposed right thereto peculiar to attorneys.

It is a new departure, without precedent. It stands unique.

Attorneys have two kinds of lien not possessed by others: One consists of a general lien founded upon possession. It extends to documents, papers and other property in his possession and to money which he has collected, until his costs and charges are paid. This is called a "retaining lien."

1 Jones on Liens (3rd Ed.) Sec. 113-152.

The other, recognized in England and in some of the States in the absence of statutes, consists of a special lien upon the judgment or fund in court which the attorney has recovered, for his services in obtaining the judgment or fund. This lien is commonly called a "charging lien."

Goodrich v. McDonald, 112 N. Y. 157; 19 N. E. 649.

In re Wilson, 12 Fed. 235, 238.

1 Jones on Liens (3rd Ed.) Sec. 153-240.

As said by Earl, J., in Goodrich v. McDonald, supra, referring to this lien:

> "It is a peculiar lien, to be enforced by peculiar methods. * * The lien was never enforced like other liens. If the fund recovered was in possession or under the control of the court, it would not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney's claim had been given, the court would not allow the judgment to be paid to the prejudice of the attorney. If paid after such notice, in disregard of his rights, the court would upon motion set aside a discharge of the judgment, and allow

> the attorney to enforce the judgment by its process, so far as was needful for his protection. But after a very careful search we have been unable to find any case where an attorney has been permitted to enforce his lien upon a judgment for his services by an equitable action, or where he has been permitted to follow the proceeds of a judgment after payment of them to his client. His lien is upon the judgment, and the courts will enforce that through the control it has of the judgment and its own records, and by means of its own process, which may be employed to enforce the judgment. But after the money recovered has been paid to his client he has no lien upon that, and much less a lien upon property purchased with that money, and transferred to another."

That such a lien does not exist and is not acquired on land the subject matter of litigation, independent of statutory authorization to that effect, either in obtaining or defending title to real estate, is supported by the great weight of authority.

> Holmes v. Waymire, 9 Am. & Eng. Anno. Cases, 624, and notes.
> 1 Jones on Liens (3rd Ed.) Sec. 229, and cases cited.

A contrary doctrine appears to have pre-

vailed only in Tennessee, where it is held that land in litigation is generally as much in the custody of the law as a pecuniary fund. But even there this lien exists only in case of actual recovery of land in a suit for that purpose, and that it cannot be extended to services which merely protect an existing title or right.

See notes, Holmes v. Waymire, supra.

The appellant invokes the benefit of the statute of Nevada, 2 Revised Laws of Nevada, 1912, Sec. 5376; (Civil Practice Act, Sec. 434), which enacts as follows:

> "The compensation of an attorney and counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosesoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. There shall be allowed to the prevailing party in any action, or special proceeding in the nature of an action, in the supreme

> and district courts, his costs and necessary disbursements, in the action or special proceeding."

This section is found in the Civil Practice Act. It will be observed that the statute contemplates "an action"; that the lien is upon "his client's cause of action or counterclaim"; that it attaches to "a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosesoever hands they may come"; that it "cannot be affected by any settlement between the parties before or after judgment."

That statute (even if available to appellant, a proposition that we confidently question) in no way whatever supports his claim for a lien upon the land.

The statute has no application to "an action" in courts of another state or jurisdiction, it applies only to an action in local courts in the state of Nevada.

> Plummer v. Great Northern Ry. Co. (Wash.) 110 Pac. 989; 31 L. R. A. (N. S.) 1215.

In Mass. & S. Const. Co. v. Township of Gill's, 48 Fed. 145, 147, Simonton, J., referring to the lien of attorneys, says:

> "This protection of attorneys, in the absence of a statute, is given by

> each court to its own officers. This court would not—perhaps I should say could not—extend the protection to services rendered in another wholly distinct juristiction."

The statute of Nevada has no possible application to proceedings ex parte or otherwise before the political department of the government of the United States, or of a State.

The Land Department is a special tribunal, vested with certain judicial powers, to hear and determine claims to public lands and make conveyances to the parties entitled thereto. The proceedings are not "an action," as contemplated by the Civil Code of Nevada.

The Nevada statute is identical with the New York statute of 1879.

N. Y. Code of Civil Procedure, Sec. 66.

This statute of New York remained unchanged until 1899, when it was amended to include the words "or special proceeding" following the words "from the commencement of an action," and also to include the words "or final order" following the words "verdict, report, decision or judgment." (Now Sec. 475 of the Judiciary Laws; Laws of 1909 c 35, being Chapter 30 of the Consolidated Laws.)

In Morey v. Schuster, 145 N. Y. S. 258, a

lien was claimed by attorneys employed to procure legislation authorizing the commissioners of the land office to convey land to the holder of a certificate of sale without further payment therefor and to procure the issuance of a patent by the land office. The court held that the attorneys had no lien on the land for their services under the New York statute as amended in 1899, nor under the law as it existed unaffected by the statute. In considering the claim of a lien for services in procuring the legislation authorizing and the land patent issued pursuant thereto in connection with perfecting defendant's title to the premises and releasing them from payment to the state of the balance of the purchase price unpaid, the court says: (p. 264)

> "It is doubtless true that, independently of any statutory provision, plaintiffs would be entitled to an attorney's retaining lien for the value of such services, provided there was anything belonging to the defendants, which had come to plaintiffs' possession or control in their professional capacity. Matter of Knapp, 85 N. Y. 284; Ward v. Craig, 87 N. Y. 550. But here there is nothing. Neither is there any 'verdict, report, decision, judgment' or 'final order in the client's favor' or 'proceeds thereof' bringing the claim within the

> equitable control of the court, under the statute. It is only, as the statute provides, 'from the commencement of an action or special proceeding, or the service of an answer containing a counterclaim,' that the statutory lien of an attorney attaches. These services did not, and in the nature of things could not, involve the expressed prerequisite of such a lien of either the commencement of an action or special proceeding or the service of an answer containing a counterclaim. It is true that these services in completing and perfecting defendants' title to the premises were performed while the ejectment action was still in its final issue undetermined. But these services were to an end distinct and separate from the conduct of the ejectment action the result of which was in no way dependent upon their success or failure."

In Deering v. Schreyer, 52 N. Y. S. 203 (affirmed, (memorandum decision) 157 N. Y. 678), James Deering presented a petition to the supreme court entitled "In the Matter of the Opening of Lexington Avenue." The proceedings were commenced to acquire title to land. Commissioners were appointed and John Schreyer, the owner of the property, employed the petitioner as attorney to take necessary proceedings to obtain compensation for the land

sought to be taken. $22,500.00 was awarded for the land, which sum remained in the hands of the comptroller of New York City. The petitioner asked for a lien. Schreyer answered that the award was made in a special proceeding and not in "an action." The question arose upon the statute prior to the amendment referred to. In denying the lien, the court say:

> "Section 66 of the Code does not apply. It is therein provided:
>
> 'From the commencement of an action or the service of an answer containing a counterclaim the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.'
>
> The lien given by this section appears to apply only to causes of action to enforce which an action had been commenced, or to recover which an answer containing a counterclaim had been served. The distinction between actions and special proceedings is recognized all through the code."

This same distinction is practically recognized in Nevada. In Haley v. Eureka County

Bank, 21 Nev. 127, 137, the court says:

> "An action is a legal prosecution by a party complainant, against a party defendant, to obtain the judgment of the court in relation to some right claimed to be secured, or some remedy claimed to be given by law to the party complaining."

Whether a special proceeding is or is not deemed "an action" in courts of justice, is quite immaterial to our inquiry here. The legal services for which the claim to a lien upon the land is invoked were not associated with any action or special proceeding in any court of justice. They were confined exclusively to sundry matters cognizable by the Land Department.

In speaking of that department, the objects of its creation and the powers it possessed, in Steel v. Smelting Co. 106 U. S. 447, 450-1, Mr. Justice Field said:

> "That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with."

The charging lien, whether by statute or independent of statute, has never been extended

to legal services in the Land Department or other executive or legislative department of the government, federal or state. It exists only in the department of courts of justice and there only in case of suits or actions and within restricted limits and upon certain essential prerequisites.

Inasmuch as appellant by his appeal invokes this court to transcend the long and firmly established basis, limits and requirements in respect to a charging lien, and adjudge him to be entitled to a lien upon the land, it is permissible to inquire what did the legal services consist of that would furnish a basis for a lien? They did not either create or reclaim the land, neither did they add any intrinsic value to the land. They could not do that. Nor does it appear that there was even any contest inaugurated, or that any adverse claim was made in the Land Department by any person against the acquisition by appellant's client of the land from the government. The only controversies appear to have been raised by the officers of the Land Department in the performance of its duty, and that particularly in respect to an irregularity suggesting the question, viz., whether the entry of the public land made by the agent

of appellant's client, the agent being also a deputy mineral surveyor, was permissible.

We gather from the appellant's second bill in intervention that prior to the employment of appellant the Pacific Reclamation Company had lawfully entered the 480 acres of land and was in possession thereof. That it had made thereon numerous and extensive improvements of great value, and that it had mortgaged the lands to the Columbia-Knickerbocker Trust Company, trustee, appellee herein. That for some reason, not disclosed, the Reclamation Company desired to have the character of entry changed and to that end applied for a relinquishment. That pending that application appellant was employed and the desired relinquishment was secured. That thereupon the land was entered by the company's then agent, George M. Bacon, for the benefit of the Pacific Reclamation Company under land script entries. That the department ascertained that Mr. Bacon was also a deputy mineral surveyor and held up the script entries pending investigation of the question as to his qualification to make the entry. That appellant secured a favorable ruling. (Tr. 15-26.)

Appellant's original bill however included also legal services alleged to have been per-

formed by him in securing from the Executive Department of the government a location of a post office upon the land as a basis for the lien he claims. (Tr. 3.) Appellant omitted to mention that service in his second bill, or to make any corresponding reduction in the amount of his claim of $25,000.00 on account of such services, notwithstanding it is quite probable that service may have materially tended to increase the market value of the land.

The proposition that appellant is entitled to a lien upon the land is too absurd, to be seriously considered by this court. No state statute for the protection of attorneys for their reasonable compensation in case of recovery in its courts of justice was ever intended to afford and include protection for legal services in the Land Department at Washington, by way of lien upon land entered or purchased. If such a lien as is prayed for is to be allowed, we submit it will require an express act of Congress before any court will sanction or award it.

In Humphrey v. Browning, 46 Ill. 476, the court aptly said:

> "It may be a lawyer's services in recovering a tract of land by suit are as meritorious as those of a carpenter or mason who builds a house; but the latter

had no lien until it was given to them by an express statute."

II.

APART FROM THE QUESTION OF APPELLANT'S RIGHT TO A LIEN UPON THE LAND, THE ORDER OR DECREE APPEALED FROM SHOULD BE AFFIRMED.

Not only was the order appealed from proper, but the entire second bill in intervention should have been stricken.

To clearly present the situation, we refer to the proceedings in the order of their occurrence:

July 7, 1914, the intervener, R. Woodland Gates, filed a petition in intervention. (Tr. 1-7.)

July 23, 1914, the appellee, Columbia-Knickerbocker Trust Company, trustee, filed a motion to dismiss and strike from the files the bill in intervention filed by R. Woodland Gates, upon the ground "that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause of action in equity, and that the allegations therein contained are insufficient to entitle the said intervener, R. Woodland Gates, or any other person, to any relief against the Columbia-Knickerbocker Trust Company"; also moved to strike out paragraph nine and the portion of the prayer

for a lien upon the 480 acres of land. (Tr. 9-12)

October 10, 1914, the court made its order granting the motion to dismiss, and allowed the intervener "twenty days within which to take such steps as he may be advised." (Tr. 12-14)

November 21, 1914, R. Woodland Gates presented another bill in intervention. (Tr. 15-27.)

November 21, 1914, Columbia-Knickerbocker Trust Company, trustee, filed a motion not only to strike out paragraphs XIV and XX and the portion of the prayer seeking a lien on 480 acres of land, but also to strike out the entire bill in intervention on the ground that the matters and things in the bill in intervention were adjudged and determined on the merits against the intervenor Gates by the former order or decree. (Tr. 28-30.)

July 24, 1915, the court filed an opinion (Tr. 31-39) in which it is said, (Tr. 34-35):

> "The trust company also urges that the subject matter on which the lien is based, the lien claimed and the so-called tribunal in which the services were rendered, are identical in both bills, and were disposed of by the decision of October 10, 1914.
>
> The last objection is well taken. The claim is to precisely the same lien

> which is urged in the original bill, and is foreclosed by the decision referred to."

July 24, 1915, the court by its order (being the order appealed from) struck out the paragraphs referred to, but made no disposition of the motion to strike out the entire bill. (Tr. 30-31.)

The two bills are in every material and essential particular the same. The additional facts and conclusions contained in the second bill are set forth in the opinion of the court. (Tr. 33-34.) They are unimportant and do not change the status. The former order or decree dismissing the bill not having been set aside or appealed from was conclusive and the second bill should have been stricken out in toto.

> Nor. Pac. Ry. Co. v. Slaght, 205 U. S. 122.
>
> Lindsley v. Union Silver Star Min. Co. (C. C. A. 9th Cir.) 115 Fed. 46.

The motion to dismiss is a substitute for a demurrer. By Rule 29 of the new rules of equity practice (198 Fed. XXVI, 115 C. C. A. XXVI) demurrers and pleas are abolished and a motion to dismiss substituted therefor.

Appellant's second bill in intervention does

not purport to be an amended bill. If, however, it could be treated as an amended bill, in pursuance to the permission granted the intervenor "to take such steps as he may be advised," and for that reason the order dismissing the original bill is not res judicata, the effect in our opinion would be no different.

The right to amend a bill when leave is granted for that purpose, does not contemplate that the averments of the original shall be practically restated. When an amended complaint is in effect but a repetition of the one it purports to amend, a motion to strike, for that reason alone, apart from the question of res judicata, is well taken. A comparison of the two bills discloses that there is no difference in the two as to the statement of ultimate facts, although evidential matters were given in somewhat different and greater detail in the second bill. It is difficult to perceive how that would make the change material. Moreover it is apparent that the appellant, by not appealing from the order dismissing the original bill on the merits and by filing another bill incorporating no material fact not found in the first or original bill, cannot be heard to complain of the order of the court in striking out parts or portions of such second bill, when it would have

been justified and upheld in striking out the entire bill.

We respectfully submit that the order appealed from should be affirmed.

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